UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
CIVIL MINUTES—GENERAL

Case No. **CV 09-08213 DMG (RZx)** Date November 21, 2011

Title ***Lillie Mae Washington v. American Home Loans, et al.*** Page 1 of 9

Present: The Honorable DOLLY M. GEE, UNITED STATES DISTRICT JUDGE

VALENCIA VALLERY	NOT REPORTED
Deputy Clerk	Court Reporter
Attorneys Present for Plaintiff(s)	Attorneys Present for Defendant(s)
None Present	None Present

Proceedings: IN CHAMBERS—ORDER GRANTING PLAINTIFF'S *EX PARTE* APPLICATION FOR TRO AND SETTING HEARING ON PLAINTIFF'S REQUEST FOR PRELIMINARY INJUNCTION

I.
INTRODUCTION

On November 17, 2011, Plaintiff filed an *ex parte* application for temporary restraining order ("TRO") and order to show cause ("OSC") re preliminary injunction [Doc. # 123]. Defendants Ocwen Loan Servicing, LLC, Mortgage Electronic Registration Systems, Inc. ("MERS"), and Western Progressive, LLC filed an opposition on November 18, 2011 [Doc. # 130]. The Court deems this matter suitable for decision without oral argument. Fed. R. Civ. P. 78(b); C.D. Cal. L.R. 7-15.

II.
LEGAL STANDARD

A plaintiff seeking injunctive relief must show that (1) she is likely to succeed on the merits; (2) she is likely to suffer irreparable harm in the absence of preliminary relief; (3) the balance of equities tips in her favor; and (4) an injunction is in the public interest. *Toyo Tire Holdings Of Ams. Inc. v. Cont'l Tire N. Am., Inc.*, 609 F.3d 975, 982 (9th Cir. 2010) (citing *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 129 S.Ct. 365, 374, 172 L.Ed.2d 249 (2008)). An injunction is also appropriate when a plaintiff raises "serious questions going to the merits," demonstrates that "the balance of hardships tips sharply in [her] favor," and "shows that there is a likelihood of irreparable injury and that the injunction is in the public interest." *Alliance for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1135 (9th Cir. 2011) (quoting *The Lands Council v. McNair*, 537 F.3d 981, 987 (9th Cir. 2008)).

III.
FACTUAL BACKGROUND

Plaintiff claims to own the real property that is the subject of this lawsuit, where she has lived for the past 41 years. (Washington Decl. ¶ 2 [Doc. # 127]; Washington Depo. at 29:17-23 [Doc. # 130-1].) Plaintiff is currently 96 years of age. Plaintiff's sons Bobby and Hobert Washington have also lived at this address. (Washington Depo. at 31:25-32:5.) According to Plaintiff, an agent from Defendant Home Loans Direct communicated with Hobert Washington in approximately October 2006. Hobert Washington was suffering from Alzheimer's Disease at the time and is now deceased. Without Plaintiff's knowledge or consent, the Home Loans Direct agent persuaded Hobert Washington to complete a loan application. (Washington Decl. ¶ 5.)

On or about October 24, 2006, another agent for Home Loans Direct—Plaintiff asserts that it was Defendant Jonathan Annett—came to the subject property with pre-prepared loan documents. Annett allegedly represented to Plaintiff that if she signed the loan documents, she would receive $80,000 in cash and have a $600-$700 monthly mortgage payment based on a fixed 6% rate of interest. (Washington Decl. ¶ 6.) In fact, Plaintiff received $95,038.19 from Home Loans Direct and the initial monthly payment on the loan was actually $2,582.29—projected to increase to $3,161.01 in December 2011—based on an initial interest rate of 9.25%. (*Id*. ¶ 13; *Ex Parte* Appl., Ex. A.)

Relying on Annett's alleged representations, Plaintiff signed some of the loan documents, including a deed of trust to the subject property (Defs.' Mar. 16, 2010 Request for Judicial Notice ("RJN") [Doc. # 10]) and riders thereto (*Ex Parte* Appl., Exs. A, B). (Washington Decl. ¶ 7.) Hobert Washington also signed these loan documents and was the sole signatory to the note underlying the deed of trust and addenda thereto. (Defs.' Requests for Admission to Pl. Set One [Doc. # 130-3], Ex. H.) In addition, Hobert Washington was the sole signatory to the variable rate mortgage program disclosure (*id*., Ex. B), the Housing Financial Discrimination Act of 1977 fair lending notice (*id*., Ex. C), and the good faith estimate of settlement charges and additional required California disclosures (*id*., Ex. E).

Plaintiff asserts that Annett failed to disclose material terms of the loan, including that the interest rate was adjustable and that it began at 10.904%.[1] (Washington Decl. ¶ 8.) Plaintiff further maintains that Annett did not leave copies of the loan documents with her or provide

[1] Presumably, Plaintiff is referring to the cost of her credit as a yearly rate—*i.e.*, the annual percentage rate ("APR")—of 10.904%, as reflected on the Truth-in-Lending disclosure statement that she signed on October 24, 2006. (Defs.' Requests for Admission to Pl. Set One, Ex. A.) The note provided for an initial interest rate of 9.25% as indicated in the deed of trust's adjustable rate rider that Plaintiff signed. (*Ex Parte* Appl., Ex. A.)

them upon request. (*Id*. ¶ 10.) Plaintiff claims that she did not receive copies of the loan documents despite repeated requests until November 25, 2006. (*Id*. ¶ 12.)

Using the cash that she received out of the loan transaction, Plaintiff made loan payments from December 2006 through October 2009.[2] After exhausting this source of funds in October 2009, Plaintiff could no longer afford to make payments on the loan. (Washington Decl. ¶ 14.)

On November 13, 2009, Plaintiff filed a complaint against "American Home Loan (CBSK Financial Group, Inc. dba)," Ocwen, MERS, DE HDL Inc., Hisham Desouki, Christopher Cox, Jonathan Annett, Lodes Capital Escrow, Inc., Nikki Hall, Fox Fields Financial, Inc., and Christopher Fox, alleging causes of action for violation of the Truth in Lending Act ("TILA"), 15 U.S.C. § 1601 *et seq*., violation of the Real Estate Settlement Procedures Act ("RESPA"), 12 U.S.C. § 2605, fraud, negligent misrepresentation, violations of the Consumer Legal Remedies Act ("CLRA"), Cal. Civ. Code § 1750 *et seq*., violations of the Unfair Competition Law ("UCL"), Cal. Bus. & Prof. Code § 17200 *et seq*., breach of financial duties, financial abuse of elders, undue influence, violation of the Perata Act, Cal. Civ. Code § 2923.6, violation of Securities and Exchange Commission rules and regulations and securities laws, and violation of the Rosenthal Fair Debt Collection Practices Act, Cal. Civ. Code § 1788 *et seq*.

Thereafter, on May 24, 2010 and September 21, 2010, Plaintiff filed a first amended complaint [Doc. # 26] and a second amended complaint [Doc. # 60], respectively. The operative second amended complaint names as defendants Home Loans Direct, Inc., Ocwen, MERS, Dennis William Cox, Jonathan Annett, Lodes Capital Escrow, Nikki Hall, Fox Fields Financial, and Western Progressive, LLC, and alleges 10 causes of action: (1) fraud; (2) breach of fiduciary duties; (3) violation of TILA; (4) violation of RESPA; (5) predatory lending; (6) violation of the UCL; (7) violation of CLRA; (8) financial abuse of elders; (9) rescission; and (10) unjust enrichment.

[2] Plaintiff states in her declaration that the last payment occurred in October 2008 (Washington Decl. ¶ 14), but presumably she means October 2009, as alleged in her second amended complaint. (2nd Am. Compl. ¶ 35.) If Plaintiff paid the projected loan payments in full each month, then as of October 2009 these payments would have totaled $94,218.71, which is approximately the amount of cash that Plaintiff claims to have received out of the loan transaction.

IV.
DISCUSSION

A. Plaintiff Has Standing To Pursue Her Claims

As a preliminary matter, Defendants challenge Plaintiff's standing generally because she did not sign the promissory note. Defendants cite *Johnson v. Ocwen Loan Servicing*, 374 Fed. Appx. 868 (11th Cir. 2010), which held that a plaintiff lacked standing because she "was not a borrower *or otherwise obligated on the . . . loan* and, therefore, did not suffer an injury-in-fact." *Id*. at 873 (emphasis added) (citing *Bennett v. Spear*, 520 U.S. 154, 162, 117 S.Ct. 1154, 137 L.Ed.2d 281 (1997); *Stalley ex rel. United States v. Orlando Reg'l Healthcare Sys., Inc.*, 524 F.3d 1229, 1232 (11th Cir. 2008)). Here, however, Plaintiff *was* otherwise obligated on the loan. Having signed the deed of trust as a joint tenant with her son, Plaintiff stands to lose the equitable interest that she has in the subject property in the event of a default on her son's loan. As such, she has Article III standing to proceed with this action.

B. Plaintiff Is Entitled To A TRO

1. Likelihood Of Success On The Merits

a. Plaintiff Is Unlikely To Succeed On Her Federal Claims

i. Truth in Lending Act

Plaintiff's third cause of action is for violations of TILA. Plaintiff alleges that Defendants failed to provide her with "accurate and clear and conspicuous material disclosures required under TILA including her right to rescission of the contract." (2nd Am. Compl. ¶ 60.) Yet, on October 24, 2006, the day that Plaintiff and her son signed the loan documents, they each signed an acknowledgement that they had received "all applicable disclosures required by the Truth in Lending Act." (Defs.' Requests for Admission to Pl. Set One, Ex. D.) They further signed a TILA disclosure statement (*id*., Ex. A) and a notice of right to cancel—*i.e.*, rescind—pursuant to TILA (*id*., Ex. G). Thus, Plaintiff appears to have seen all of the required disclosures at closing.

Moreover, Plaintiff's TILA claims are time-barred. Plaintiff constructively filed her complaint on November 9, 2009. TILA imposes a statute of limitations of one year on actions for damages, 15 U.S.C. § 1640(e), and three years on actions for rescission, *id*. § 1653(f). As applicable here, these limitations periods run from the date that the transaction is consummated.

King v. California, 784 F.2d 910, 913, 915 (9th Cir. 1986). Although claims for damages are subject to equitable tolling, *id*. at 915, three years is the "absolute limitation on rescission actions," *id*. at 913.

Plaintiff received the loan documents on November 25, 2006, approximately one month after she signed the loan documents. (Washington Decl. ¶ 12.) Even if she is entitled to one month of equitable tolling on her claims for damages, she still waited well over one year to file the instant action. Plaintiff's claim for rescission is not subject to equitable tolling. In fact, the statute explicitly precludes extending the time to rescind based on "the fact that the information and forms required . . . or any other disclosures required . . . have not been delivered." 15 U.S.C. § 1635(f). Therefore, Plaintiff's TILA claims are untimely.

In the second amended complaint, Plaintiff asserts that her federal causes of action meet the applicable statutes of limitations because of a letter that she and Hobert Washington wrote to Home Loans Direct on October 19, 2009. (2nd Am. Compl. ¶¶ 62, 71.) The letter purportedly stated that they rescinded their loan pursuant to TILA and believed that there may be other violations of state and federal lending laws. (*Id*. ¶ 36.) Ocwen allegedly sent a letter in response on November 19, 2009 that denied the rescission request. (*Id*. ¶ 38.)

Plaintiff's October 2009 letter does not render her TILA rescission claim timely. As stated above, this claim is not subject to equitable tolling. Regardless, Plaintiff was entitled to rescind the loan transaction only for a period of *three days* "following the consummation of the transaction or the delivery of the information and rescission forms required under [TILA] together with a statement containing the material disclosures required under [TILA], whichever is later." 15 U.S.C. § 1635(a). Thus, Plaintiff was entitled to exercise her rescission option until November 28, 2006 at the latest.

ii. Real Estate Settlement Procedures Act

Plaintiff's fourth cause of action under RESPA fares no better. Plaintiff maintains that Defendants violated RESPA by (1) not providing her with standard good faith estimates clearly disclosing key loan terms and closing costs; (2) not providing her with a new HUD-1 settlement statement; and (3) providing payments to the mortgage broker and lender that were misleading and designed to create a windfall, *i.e.*, a "yield spread premium" or rebate. (2nd Am. Compl. ¶ 69.)

Plaintiff's first two claims—that Defendants failed to make various disclosures at the loan origination—fail because RESPA contains no such private right of action. *See Collins v.*

FMHA-USDA, 105 F.3d 1366, 1368 (11th Cir. 1997) (*per curiam*) (holding that "there is no private civil action for a violation of 12 U.S.C. § 2604(c), or any regulations relating to it"); *Davenport v. Litton Loan Servicing, LP*, 725 F. Supp. 2d 862, 874 (N.D. Cal. 2010) ("Courts in this district have analyzed RESPA's structure and persuasively reasoned that Congress did not intend to create a private right of action for the sections that contemplate disclosure violations."); *Sipe v. Countrywide Bank*, 690 F. Supp. 2d 1141, 1155 (E.D. Cal. 2010) ("[T]he RESPA disclosure provisions that do confer a private right of action do not pertain to disclosures at a loan's closing." (citing *Lingad v. Indymac Fed. Bank*, 682 F. Supp. 2d 1142, 1151 (E.D. Cal. 2010))). To the extent Plaintiff's third claim is that Defendants overcharged her, this is not actionable under 12 U.S.C. § 2607(b). *See Martinez v. Wells Fargo Home Mortg., Inc.*, 598 F.3d 549, 554 (9th Cir. 2010).

In any event, Plaintiff's claim involving a "yield spread premium" or "rebate"—presumably brought under RESPA's prohibition on fees, kickbacks, or other things of value in exchange for business referrals, 12 U.S.C. § 2607(a), or prohibition on splitting charges, *id*. § 2607(b)—is time-barred. RESPA provides a one-year statute of limitations for such a claim. *See* 12 U.S.C. § 2614 (providing that actions under Section 2607 must be brought within one year "from the date of the occurrence of the violation"); *see also In re Cmty. Bank of N. Va.*, 622 F.3d 275, 303 (3d Cir. 2010) (explaining that the limitations period for actions under 12 U.S.C. § 2607 "begins to run from the date the loan closed"); *Snow v. 1st Am. Title Ins. Co.*, 332 F.3d 356, 359 (5th Cir. 2003) (same). For the reasons previously discussed, Plaintiff did not file her RESPA claims within one year of the date of closing and any equitable tolling to which she may be entitled appears insufficient to salve the deficiency. Consequently, Plaintiff is unlikely to prevail on her federal claims.

b. Plaintiff Raises Serious Questions As To The Merits Of Her Claim For Predatory Lending

In Plaintiff's fifth cause of action, she contends that Defendants engaged in predatory lending practices in violation of California Financial Code section 4973. The purpose of this statute is "to regulate and thereby curtail predatory lending practices that typically occur in the subprime mortgage market." *Am. Fin. Servs. Ass'n v. City of Oakland*, 34 Cal. 4th 1239, 1246, 23 Cal. Rptr. 3d 453 (2005). It contains numerous prohibitions and limitations regarding a "covered loan," *id*., which it defines as follows:

> a consumer loan in which the original principal balance of the loan does not exceed the most current conforming loan limit for a single-family first mortgage loan established by the Federal National Mortgage Association [Fannie Mae] in

the case of a mortgage or deed of trust, and where one of the following conditions are met:

(1) For a mortgage or deed of trust, the annual percentage rate at consummation of the transaction will exceed by more than eight percentage points the yield on Treasury securities having comparable periods of maturity on the 15th day of the month immediately preceding the month in which the application for the extension of credit is received by the creditor.

(2) The total points and fees payable by the consumer at or before closing for a mortgage or deed of trust will exceed 6 percent of the total loan amount.

Cal. Fin. Code § 4970(b).

In 2006, Fannie Mae's conforming loan limit for a single-family first mortgage loan was $417,000. *See* Fannie Mae, Historical Conventional Loan Limits, https://www.efanniemae.com/sf/refmaterials/loanlimits/pdf/historicalloanlimits.pdf. The loan on the subject property, for $335,000, did not exceed that amount. Thus, the loan is a covered loan if it meets one of the two enumerated conditions.

Turning to the first condition, on September 15, 2006, 30-year Treasury bills had a 4.92% yield. *See* Board of Governors of the Federal Reserve System, Selected Interest Rates (Daily)—H.15, http://www.federalreserve.gov/releases/h15/data.htm. Plaintiff's initial APR, 10.904%, was not more than eight percentage points above the applicable Treasury bill rate. (*See* Defs.' Requests for Admission to Pl. Set One, Ex. A.) Therefore, the first condition is not met.

With respect to the second condition, the total loan amount was $335,000. Six percent of that amount is equivalent to $20,100. Plaintiff paid a total of $35,062.83 in settlement charges, including a $14,120 loan origination fee, a $900 appraisal fee, a $1,500 processing fee, an $890 application fee, and $10,850 in unexplained "Additional Settlement Charges" attributed to "Fox Fields Financial," "Bank of America," "THD/CBSD," "Chase," and "B of A MBNA." (Defs.' Requests for Admission to Pl. Set One, Ex. F (capitalization omitted).) Because the total points and fees payable at closing are likely in excess of $20,100, the loan at issue is likely a covered loan.

Among the many requirements applicable to covered loans, one is that the loan originator is prohibited from making or arranging the loan unless the originator "reasonably believes the

consumer[s] . . . will be able to make the scheduled payments to repay the obligation based upon a consideration of their current and expected income, current obligations, employment status, and other financial resources, other than the consumer's [sic] equity in the dwelling that secures repayment of the loan." Cal. Fin. Code § 4973(f)(1). Plaintiff claims that Defendants "put Plaintiff into a loan with little or no regard to, among other things, her ability to repay the loan." (2nd Am. Compl. ¶ 76.) Defendants offer no evidence to suggest otherwise. Based on the evidence before the Court, Plaintiff raises serious questions as to the merits of this claim.

2. Likelihood Of Irreparable Harm

Plaintiff's home is unique and its potential loss through foreclosure constitutes a threat of irreparable injury to Plaintiff. *See, e.g., Sundance Land Corp. v. Cmty. 1st Fed. Sav. & Loan Ass'n*, 840 F.2d 653, 661 (9th Cir. 1988) (finding that plaintiff met irreparable harm requirement by showing it would lose unique property upon foreclosure).

3. Balance Of Equities

In addition, the equities tilt sharply in Plaintiff's favor. Plaintiff, a 96-year-old woman, currently lives in her home and will face eviction if her request for an injunction is not granted. Defendants, on the other hand, neither contend nor present any evidence that an injunction will cause them any undue hardship. Thus, the balance of equities strongly favors Plaintiff.

4. Public Interest

As this lawsuit involves a contractual transaction between two private parties, the public interest is not an appreciable factor in determining Plaintiff's entitlement to injunctive relief. Nonetheless, the public interest is served by ensuring that homeowners are not irreparably harmed by home loans made in violation of predatory lending laws.

C. A Bond Is Required

Given that Plaintiff raises serious questions going to the merits of her predatory lending claim and shows a likelihood of irreparable harm, and that the balance of equities and public interest favor an injunction, the Court will issue a TRO. Federal Rule of Civil Procedure 65(c) permits a court to issue a TRO "only if the movant gives security in an amount that the court considers proper to pay the costs and damages sustained by any party found to have been wrongfully enjoined or restrained." Therefore, the Court will require a $650 bond, which reflects a reasonable rental rate for the subject property over a three-week period discounted by a

probability that the property would not be rented out in the first three weeks following foreclosure.

V.
CONCLUSION

In light of the foregoing, Plaintiff's *ex parte* application for TRO is **GRANTED**. Defendants, their officers, agents, employees, representatives, and all persons acting in concert or participating with them, shall be **ENJOINED** from (1) conducting a trustee's sale of the following subject property: lot 111 of tract 4795 in the City of Los Angeles, County of Los Angeles, State of California, as per map recorded in book 52, page 28 of maps, in the Los Angeles County Recorder's Office, assessor's parcel number 5063007082, which currently has the address of 2315, 2315 ¼, and 2315 ½ Hauser Boulevard, Los Angeles, California 90016; (2) reselling, or otherwise transferring, encumbering, or hypothecating the subject property to any third party; and (3) ejecting or otherwise displacing Plaintiff from the subject property. This TRO shall become valid upon the posting of $650 security, in the form of a bond or other form approved by the Court, and shall expire on **December 13, 2011**.

Defendants are **ORDERED TO SHOW CAUSE** why a preliminary injunction should not be granted preventing them, their officers, agents, employees, representatives, and all persons acting in concert or participating with them, from conducting a trustee's sale of the subject property during the pendency of this action. Defendants shall file their response by no later than **November 30, 2011**. Plaintiff shall file her reply by **December 7, 2011**. The Court sets a hearing regarding Plaintiff's request for preliminary injunction on **December 12, 2011 at 11:00 a.m.**

The Court intends to convert the pending motions to dismiss [Doc. ## 67, 71, 81] into motions for partial summary judgment with respect to Plaintiff's federal claims. *See* Fed. R. Civ. P. 12(d). If Plaintiff has any evidence to support equitable tolling or additional argument regarding the statute of limitations on her federal claims,[3] she shall file a brief addressing this issue by **November 30, 2011**. Defendants shall file any reply by **December 7, 2011**.

IT IS SO ORDERED.

[3] The Court notes that Plaintiff did not file an opposition to the motions to dismiss by either the original or extended deadlines. As such, she has forfeited her right to do so. Because there will necessarily be some overlap of issues between Plaintiff's motion for preliminary injunction and Defendants' motions to dismiss, the Court will consider Plaintiff's arguments in both contexts where applicable.